



Reg. Civil Suit No. 39/2020
Pandurang Kini and Ors.
Versus...
Prabhakar Kini and Ors.

COMMON ORDER BELOW EXH. 5 AND 40

(Passed on this 29th day of April, 2023)

Plaintiffs have filed an application at Exh. 5 under Order XXXIX, Rule 1 and 2 of the Code of Civil Procedure (in short 'C.P.C.') for temporary injunction and application at Exh. 40 under section 151 of C. P. C. for grant of stay to the construction of defendants carried on the suit property.

2. Plaintiffs contented that one Govind Hari Kini was their and defendants' common ancestor. Father of plaintiffs, Ganpat Kini and father of defendants Rambhau alias Rama Kini were son of Govind Kini. He was tenant in fields Survey No. 1039/A (Old Survey No. 146), area 0.88 HR and Survey No. 1039/B (Old Survey No. 145), area 0.30.3 HR of Village Kelwa, Tal. Dist. Palghar. The said fields are hereinafter referred as "the suit property". After his demise, purchase certificate is issued in the name of his legal heirs, Ramabhau alias Rama Kini and Ganpat Kini under the provision of Section 32 M of the Bombay Tenancy and Agricultural Lands Act, 1948 (In short "The Act"). Rambhau alias Rama Kini and Ganpat Kini had half share each in the suit property and they were in possession of their respective share. But the revenue record of the suit property came to be mutated in the name of Rambhau alias Rama Kini only. After their demise, plaintiffs and defendants are in possession of the suit property in their respective shares. There are their separate houses on the suit property since their forefather. They filed revenue appeal before the Sub-divisional Officer, Palghar for correction of mutation entries No. 3084 and 3638 in their name. But the said appeal came to be dismissed. Defendants have denied their right in

the suit property by filing their reply in the said revenue appeal. By taking disadvantage of their name in the revenue record, defendants will deny their right in the suit property and will create doubt about their ownership and possession thereon. Hence, they filed application below Exh. 5. During pending of this suit, defendants started construction on 40X20 square feet land out of the suit property. Hence, they filed an application below Exh. 40.

3. On the contrary, defendants filed their reply and written statement Exh. 19 and reply to Exh. 40 at Exh. 44 and denied all adverse contentions against them. They have not disputed their relations with common ancestor and plaintiffs. They have also not disputed that Ganpat Kini and Rambhau alias Rama Kini were heir of the deceased, Govind Kini. They contended that the suit land was mutated in the name of their father in the year 1956. The suit property is purchased by their father in the year 1962 in view of provision of section 32 G of the Act. Father of plaintiffs did not claim any right in the suit property till his demise on 01.03.1972. After his demise, plaintiffs have challenged Mutation entries No. 3084 and 3638 by filing revenue appeal No. 34/2019 in the year 2019 before the Sub-divisional Officer which is come to be dismissed. Plaintiffs have no nexus with the suit property. The instant suit is false and frivolous. Their house is on the suit property since its acquisition under the provisions of the Act. Walls and flooring of two rooms out of their house were cracked and there was every possibility of collapse of those rooms at any time. Therefore, defendant No. 1 have started construction thereof. But there is no new construction. These applications are false. Hence, submitted for rejection of these applications with costs.

4. Heard Shri. R. R. Pal, learned counsel for plaintiffs and

Shri. N. H. Tarde, learned counsel for defendants at considerable length. Following points arise for my determination and I record my findings with reasons thereon as under:-

Sr. No.	<u>Points</u>	<u>Findings</u>
1.	Whether plaintiffs have made out prima-facie case?	: No
2.	Whether plaintiffs have proved that balance of convenience lies in their favour?	: No
3.	Whether plaintiffs have proved that they will suffer irreparable loss, if temporary injunction is not granted?	: No
4.	Whether plaintiffs are entitled for the relief of temporary injunction and stay as prayed?	: No
5.	What order?	: Applications are rejected as per final order.

REASONS

As to points No. 1 to 4 :-

5. Needless to say, that injunction is a form of equitable relief and has to be adjusted in the aid of equity and justice to the facts and circumstances of each individual case. Granting of injunction being itself a discretionary matter, there is no straight jacket formula in the matter of granting or refusing temporary injunction. Depending on each case on its own facts, three cardinal principles governing grant of temporary injunction have been accepted, namely (i) a strong prima-facie case, (ii) the balance of convenience and (iii) irreparable

loss and injury. Ordinarily in deciding a case for seeking temporary injunction the Court must be satisfied that (a) whether a strong prima-facie case, (b) the balance of convenience is in his favour i.e. it would cause greater inconvenience to him if the injunction is not granted than the inconvenience which the opposite party or the persons claiming through the opposite party would be put to if temporary injunction is granted and (c) whether the plaintiff would suffer irreparable loss and injury.

6. Keeping in mind the aforesaid settled position, these applications need to be decided. Plaintiffs have contended that their common ancestor Govind Hari Kini was tenant of the suit property, after his demise father of defendants, Rambhau alias Rama Kini and their father Ganpat Kini had half share each in it and they were in possession of their respective shares and after demise of their respective fathers, they are in possession of the suit property in their respective shares. On the contrary, defendants came with defence that the suit property is self acquired property of their father as he had purchased it under the provision section 32 G of the Act and after his demise, they are owners and in possession thereof. Plaintiffs have filed 7/12 extracts as documents No. 1 and 2 alongwith list of documents (Exh. 3) on record. Perusal of 7/12 extracts, reveal that name of defendants are recorded as occupants of survey No. 1039/A, area 0.88 H.R. and Survey No. 10/B area 0.30.3 H.R. of village Kelwa, Tal. Dist. Palghar in coumn No. 7 for the year 2017-18 of the said 7/12 extracts. The Village form 8-A which is filed as document no. 3 list of documents (Exh. 3), discloses that name of defendants is recorded as owners of survey No. 1039/A and 1039/B, area 0.88 HR and 0.30.3 HR, respectively of village Kelwa. 7/12 extracts filed as documents No. 6 and 7 show that name of Govind Hari is recorded as a tenant of survey No. 145 and 146 of village Kelwa. Mutation entry

No. 1442 shows that name of Govind Hari Kini is recorded as tenant for Survey No. 145 and 146. Mutation entry No. 3084 discloses that name of Rama Govind is recorded as legal heir of Govind Hari for survey No. 145 and 146. Mutation entry No. 3638 shows that name of Rama Govind is recorded by deleting name of Ganpat in view of purchase of Survey No. 145 under the provision of section 32 G of the Act. The aforesaid revenue record shows that the name of Govin Hari Kini is recorded as owner of the suit property and after of his demise, name of Rama Kini was mutated and after his demise, name of defendants are recorded as owners thereof.

7. Plaintiffs have filed copy of order of the Sub-divisional Officer in Revenue Appeal No. 34/2019 on record which discloses that the said appeal is dismissed. Plaintiffs have also filed purchase certificate issued under section 32 M of the Act on record. It shows that Rama Kini and Ganpat Kini have purchased survey No. 145 and 146 of village Kelwa jointly on 28.07.1962. The said purchase certificate is a conclusive proof of right and title. It prima-facie shows that Rama Kini and Ganpat Kini were owner of the suit property in view of the said purchase certificate. But revenue record of the suit property is maintained in the name of Rama Kini and after his demise in the name of defendants. It is settled position that entries in the revenue record can not confer any right and title on the person in whose name it is maintained. It can be used for fiscal purpose only. Therefore, revenue record does not confer prima-facie any right and title in favour of defendants.

8. The purchase certificate prima-facie shows that fathers of plaintiffs and defendants are joint owners of the suit property. There is nothing on record which shows that the suit property is partitioned among fathers of parties of the suit by metes and bounds and after

their demise, parties are exclusive owners and in possession of the suit property as claimed by plaintiffs. Plaintiffs came with the case that the suit property is their joint family property and they are in possession of half share therein. But there is nothing on record which shows that the suit property is partitioned among fathers of the parties by metes and bounds and after demise of their respective father, they are in possession of their share. Therefore, one can hold prima-facie that the suit property is joint property of the parties of the suit.

9. It is settled position that a co-owner who is not in possession of any part of the property is not entitled to seek an injunction against another co-owner who has been in exclusive possession of the common property unless any act of the person in possession of the property amounts to ouster, prejudicial or adverse to the interest of co-owner out of possession. Mere making of construction or improvement of, in, the common property does not amount to ouster. In the present case, plaintiffs came with case that defendants are making construction on the suit property. They have filed photographs on record along with list of documents (Exh. 43 and 47) which shows that the construction is in progress. Defendants have not disputed that they are making construction on the suit property. Mere making of construction or improvement of, in, the common property does not amount to ouster. Plaintiffs are seeking partition of the suit property. If plaintiffs succeeded to prove their share in the suit property after final hearing of the suit, on partition by metes and bounds, they will get their share in the suit property. On partition, the portion on which defendants are making construction may allot in their share. If it is not possible to allot portion on which they are making construction to them on partition, defendants will suffer loss, if any caused to them. The act of making

construction on the joint family property by defendants does not amount to ouster of plaintiffs from the suit property. Therefore, considering the aforesaid legal position, the parties to the suit are co-sharers and co-owners of the suit property, each and every co-sharer is in possession of every inch of it. Every co-owner has a right to use the joint property. Therefore, plaintiffs failed to establish prima facie that they are in exclusive possession of the suit property.

10. The learned counsel for plaintiffs relied on the decision of the Hon'ble Bombay High Court Bench at Aurangabad in the case of **Laxmikant Diliprao Garje Vs. Shirkant Diliprao Garje, Writ Petition No. 6849/2020, decided on 16.12.2020** and argued that the temporary injunction can be granted against co-owner of the suit property. Fact of the cited case are that the plaintiff therein had filed a suit for perpetual injunction restraining the defendant from alienating any portion of the suit property. The grandfather of plaintiff and defendant therein had gifted the suit property to them and they were received it jointly. The defendant was attempting to sell out the portion out of the suit property by claiming possession over the specific portion thereof. In such circumstances, the Hon'ble Bombay High Court Bench at Aurangabad has pleased to hold that if the property till continuous to be joint and attempt of sale of portion thereof, would certainly be detrimental to the principle of joint ownership. In the present case, plaintiffs have filed instant suit for declaration, partition and injunction against defendants. Plaintiffs himself came with case that defendants will create third party interest in the suit property by taking disadvantage of mutation of revenue record in their name. But it is mere suspicion. There is noting on record which show that defendants have tried or attempted to create third party interest in the suit property at any time. They have not given single instance of it. There is no pleading and

substance on record which shows that defendants have entered into an agreement to sell out the suit property with any person for certain consideration. There is also noting on record which discloses as to how the protection under section 52 of the Transfer of Property Act, 1882 is inadequate. In such circumstances, mere suspicion is not sufficient to grant temporary injunction. The facts of cited case and case in hand are not identical. Therefore, the ratio laid down in the cited case is not applicable to the case of plaintiffs with all respect.

11. In such circumstances, one can safely hold that plaintiffs are not exclusive owner and in possession of the suit property. There is no evidence which prima facie shows that plaintiffs are in exclusive possession of the suit property before filing of this suit. They also failed to show that defendants are attempting to alienate the suit property. Therefore, in such facts and circumstances, one can safely hold that plaintiffs are not exclusive owner and in possession of the suit property and defendants are attempting to alienate it.

12. In view of aforesaid discussion, plaintiffs failed to establish that they have prima facie case and balance of convenience lies in their favour. In case this application is not allowed, plaintiffs will not suffer irreparable loss as they are not exclusive owners and in possession of the suit property. If they succeeded to prove their share in the suit property, on partition they will get their share in it. Hence, I answer points No. 1 to 3 in negative. In view of these negative findings, plaintiffs are not entitled for temporary injunction and stay as sought. Therefore, instant applications need to be rejected. Consequently, I answer point No. 4 in negative.

As to point No. 5:-

13. In view of above discussion and findings, I pass following

order:-

ORDER

1. Applications at Exh. 5 and 40 are hereby rejected.
2. Costs in cause.

(Typed and pronounced in open court.)

Palghar.
Date:- 29.04.2023.

(Mahendra K. Sorte)
Jt. Civil Judge, Jr. Dn.,
Palghar.